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RECORD, CASE No. 13,653.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 100.

MARCELLA DOYLE, PLAINTIFF IN ERROR,

vs.

THE UNION PACIFIC RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED SEPTEMBER 25, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 14, 1892.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 7th day of January, A. D. 1886, came Marcella Doyle, by A. H. De France and Patterson and Thomas, her attorneys, and filed in said court her complaint and sued out of said court a writ of summons against the Union Pacific Railway Company; and the said complaint is in words and figures as follows, to wit:

UNITED STATES OF NORTH AMERICA, } ss:
State of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

MARCELLA DOYLE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff complains and alleges:

I.

That at the times hereinafter mentioned the defendant was a corporation duly organized under the laws of the United
2 States and was in possession of and operating a certain railroad in the State of Colorado known as the Denver, South Park and Pacific railroad, together with its tracks, cars, locomotives, section-houses, and other appurtenances thereto belonging.

That before the happening of the matters and things hereinafter stated the said defendant company had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of certain of its employees working in said locality and passing through the same in the course of their employment; that the said building was of a fragile structure and in nowise calculated or constructed so as to resist a snow-slide coming upon it or any other body of such weight or size.

II.

That at the times hereinafter mentioned the plaintiff was a widow lady and the mother of one Martin Doyle, who was killed, as hereinafter stated; that the father of said Martin Doyle died on or about the 8th day of April, A. D. 1880; that the said Martin Doyle had no wife or child living at the time of his death, hereinafter stated, but was unmarried and of the age of twenty-three years, and up to that time resided and made his home with the plaintiff, and had aided and assisted and was then aiding and assisting her in the support of herself and family, of which the defendant then and for a long time previous thereto had knowledge.

III.

That on or about the fifth day of November, A. D. 1883,
3 at the instance and request of the defendant and for the mutual benefit of herself and the defendant, the plaintiff undertook and agreed with defendant to keep for it, during its will and pleasure, its said section-house situated at or near said Woodstock, on the line of said railroad, in the county of Chaffee and State of Colorado; that by the agreement so made between her and the defendant she was to board at said section-house such section hands and other employees and servants of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the persons so to be boarded, but the defendant was to aid and assist her in collecting her pay for such board by retaining the same for her out of the wages of the men or employees so to be boarded; that there*from*, to wit, on or about the day and year last aforesaid, she moved into said section-house with her children and entered upon the discharge of her duties as such section-house keeper and remained there as such keeper, discharging her duties as such, until the occurrence of the snow-slide hereinafter mentioned, in and by which her said son, Martin Doyle, lost his life.

IV.

That said section-house was situated in a mountainous region, near the foot of large mountains, in a locality where snow was and had been accustomed to fall in the winter season of each year to great depths and where dangerous snow-slides were liable to occur and had occurred, and where a great snow-slide did occur during the early part of the spring or latter part of the winter next previous to November, 1883, by reason whereof the said section-house was an unsafe and dangerous place to live in during the winter and
4 spring time of each year; of all which facts and danger the defendant was well aware and had knowledge at and before the time the plaintiff so moved into said section-house and during the time she so remained there, but of which facts, to wit, the occurrence of such previous snow-slide and of said danger, neither the plaintiff nor her said son, Martin Doyle, had any notice or knowledge whatsoever at or before the occurrence of the snow-slide hereinafter mentioned, in and by which her said son, Martin Doyle, lost his life; that the defendant well knew, long before the said snow-slide hereinafter mentioned occurred, that her said son, Martin Doyle, was living in the section-house aforesaid with the plaintiff and aiding and assisting her in and about her duties and the business of keeping said section-house, and that notwithstanding it was the duty of the defendant to notify the plaintiff of said danger, and also to notify her said son Martin thereof, yet the defendant, neglecting its duty in this respect, did not at any time notify either the plaintiff or her said son Martin thereof, but knowingly and wilfully withheld all information thereof from the plaintiff and her said son Martin and from each of them.

That the defendant also neglected and failed to erect or construct a suitable break or barrier to protect said section-house and the plaintiff and her family against said danger, but carelessly left the said section-house and plaintiff and her family unprotected against said danger and exposed thereto during the whole time they so kept and occupied said house.

V.

That on or about the tenth day of March, A. D. 1884, the
5 snow, having previously thereto fallen in great quantities and to a great depth about said section-house and upon the mountains and mountain sides immediately above and surrounding said section-house, broke loose from the mountain side above said section-house and slid down in large bodies against and upon said section-house and crushed in the roof and other parts thereof and then and there killed her said son, Martin Doyle, then in said house, and a number of other inmates therein, whereby and by reason of the wrongful and fraudulent acts, neglects, and defaults of the defendant in not notifying the plaintiff or her said son Martin of said danger and in wilfully withholding all notice and knowledge thereof from her and her said son Martin and from each of them, and in building the said house in said place and in keeping the same there, and in not erecting a suitable break or barrier to protect the said section-house and its inmates from said danger, and without any fault or negligence on the part of the plaintiff or on the part of her said son, Martin Doyle, her said son Martin was killed, and whereby and by reason of the death of her said son Martin, so caused as aforesaid by defendant, the plaintiff has sustained great damages, to wit, in the sum of five thousand dollars.

Second.

For a second cause of action:

1.

That at the times hereinafter mentioned the defendant was a corporation duly organized under the laws of the United States and was in possession of and operating a certain railroad in the State of
6 Colorado known as the Denver, South Park and Pacific railroad, together with the tracks, cars, locomotives, section-houses, and other appurtenances thereto belonging; that before the happening of the matters and things hereinafter stated the said defendant company had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of certain of its employees working in said locality and passing through the same in the course of their employment; that the said building was of a fragile structure and in nowise calculated or constructed so as to resist a snow-slide coming upon it or any other body of such weight or size.

2.

That at the times hereinafter mentioned the plaintiff was the mother of Andrew Doyle, who lost his life as hereinafter stated; that the father of said Andrew Doyle died on or about the 8th day of April, A. D. 1880; that said Andrew at the time of his death, hereinafter mentioned, was nineteen years of age and had no wife or child living, but was unmarried, and up to that time had resided and made his home with plaintiff and aided and assisted her in providing a support for herself and family; that at the time of his death and for some length of time previous thereto the said Andrew Doyle was and had been engaged at work for wages in the employ of the defendant as a section hand on the same section of said railroad whereon the section-house hereinafter mentioned was located, and said section-house hereinafter mentioned was *located, and said section-house was* the place provided and designated by the defendant as the place at which the said Andrew was to board and lodge during the time he was so engaged at work for defendant.

3.

7 That on or about the fifth day of November, A. D. 1883, at the instance and request of defendant and for the mutual benefit of herself and defendant, the plaintiff undertook and agreed with defendant to keep for it, during its will and pleasure, the said section-house situated at or near Woodstock, on the line of said railway, in the county of Chaffee and State of Colorado as aforesaid; that by the said agreement between her and defendant she was to furnish board at said section-house for such agents, employees, and servants of the defendant as it should desire, at and for the rate of four and one-half dollars per week, to be paid by the person so to be furnished with board, but the defendant was to aid and assist her in collecting her pay for such board by stopping and retaining the same for her out of the wages of her said boarders; that the plaintiff thereupon, to wit, on or about the 5th day of November, A. D. 1883, moved into said section-house with her family and immediately entered upon the discharge of her duties as the keeper thereof and so remained there discharging her duties as such keeper until the occurrence of the snow-slide hereinbefore mentioned, in and by which her son Andrew lost his life.

4.

That said section-house was situated in a mountainous region, near the base of large mountains and in a locality where snow was accustomed to fall in the winter season of each year to great depths, and where, by reason thereof, snow-slides had occurred and were liable to occur, and where, during the spring or winter next previous to November, 1883, a great snow-slide did occur, by reason whereof said section-house was an unsafe and dangerous place to live in during the winter and spring time of each year; that the

defendant had knowledge and was well aware of the facts
8 and danger aforesaid at and before the time the plaintiff moved into said section-house, but wholly neglected and failed then or at any time to inform or notify the plaintiff or her said son Andrew thereof and wilfully withheld such notice and information from them and each of them during the whole time *of* the plaintiff so kept said section-house, although it was its duty to so inform them and each of them; that the defendant also failed and neglected to erect or construct at any time a suitable break or barrier to p otect the said section-house and its inmates against said danger, but negligently left the same wholly unprotected; that the plaintiff and the said Andrew and each of them were and so remained during the whole time she kept said house wholly ignorant of said danger and of the occurrence of such previous snow-slide.

5.

That on or about the tenth day of March, A. D. 1884, the snow, having previously thereto fallen in great quantities and to a great depth around and about said section-house and on the mountains and mountain sides next to and immediately surrounding said section-house, broke loose from the mountain sides above said section-house and slid down in large bodies against and upon said section-house and crushed in the roof and other parts thereof and killed the said Andrew Doyle, then in said house, and a large number of its other inmates, whereby and by reason of the wrongful and fraudulent acts, neglects, and defaults of the defendant in failing to notify the plaintiff or her said son Andrew of said danger, in withholding information thereof from them and each of them, in building said house in said place and in suffering the same to remain there, and in failing and neglecting to provide or construct a break or barrier to protect said section-house against said danger, and without any fault or negligence on the part of either the plaintiff
9 or the said Andrew, he, the said Andrew Doyle, was killed, whereby the plaintiff was damaged in the sum of five thousand dollars.

Third.

For a third cause of action:

1.

That at the times hereinafter mentioned the defendant was a corporation duly organized under the laws of the United States and was possessed of and operating a certain railroad in the State of Colorado known as the Denver, South Park and Pacific railroad, together with its tracks, cars, locomotives, section-houses, and other appurtenances thereto belonging; that before the happening of the matters and things hereinafter stated the said defendant company had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding

and lodging of certain of its employees working in said locality and passing through the same in the course of their employment; that the said building was of a fragile structure and in nowise calculated or constructed so as to resist a snow-slide coming upon it or any other body of such weight or size.

2.

That at the times hereinafter mentioned the plaintiff was the mother of one Christopher Doyle, who lost his life, as hereinafter stated; that the father of said Christopher died on or about the 8th day of April, A. D. 1880; that said Christopher, at the time of his death, hereinafter mentioned, was a minor, under the age of ten years, and living with the plaintiff, of which the defendant then and for a long time previous had due knowledge.

3.

That on or about the 5th day of November, A. D. 1883, at the instance and request of the defendant and for the mutual benefit of herself and defendant, the plaintiff undertook and agreed with defendant to keep for it, during its will and pleasure, its section-house situated at or near Woodstock, on the line of said railroad, in the county of Chaffee and State of Colorado; that by the said agreement between her and the defendant she was to *be* provided and furnish board at said section-house for such section hands and other employees of defendant as it should desire, at and for the rate of four and one-half dollars per week, to be paid for by the persons so to be furnished with board, but the defendant was to aid and assist her in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so to be furnished with board; that the plaintiff thereupon, to wit, on or about the day and year last aforesaid, moved into said section-house with her family and immediately entered upon the discharge of her duties as the keeper thereof and remained and continued to discharge such duties thereat until the occurrence of the snow-slide hereinafter mentioned.

4.

That said section-house was situated in a mountainous region, near the base of large mountains and in a locality where snow was accustomed to fall in the winter season of each year to great depths, and where snow-slides had occurred and were liable to occur, and where during the spring or winter next previous to the fifth of November, 1883, a great snow-slide did occur, by reason whereof the said section-house was an unsafe and dangerous place to live in during the winter and spring time of each year; that the defendant had knowledge and was well aware of the facts and danger aforesaid at and before the time the plaintiff so moved into said section-
11 house, but failed and neglected then or at any time to notify or inform the plaintiff thereof or the said Christopher, and wilfully withheld such notice and information from each and both

of them during the whole time the plaintiff with her family so kept and occupied said section-house, although it was its duty to inform her thereof, and also her said child; that the plaintiff and her said son and each of them were and remained during the whole time she so kept said house wholly ignorant of said danger and of the fact of the occurrence of such previous snow-slide; that the defendant also failed and neglected at any time to erect or construct a break or barrier to protect the said section-house or its inmates against said danger, but le-t the same wholly unprotected.

5.

That on or about the 10th day of March, A. D. 1884, the snow, having previously thereto fallen in great quantities and to a great depth about said section-house and upon the mountains and mountain sides immediately surrounding said section-house, broke loose from the mountain sides above said section-house and slid down in large bodies against and upon said section-house and crushed in the roof and other parts of said house and then and there killed her said son Christopher, then in said house, and also a large number of other persons therein, whereby and by reason of the said wrongful and fraudulent acts, neglects, and defaults of the defendant in failing and neglecting to notify the plaintiff and her said child or either of them of said danger, and in wilfully withholding all notice and knowledge of said danger from the plaintiff and her said son, in building said house in said place of danger and in suffering it to remain there, and in failing and neglecting to erect or construct a suitable break or barrier to guard and protect said house and its inmates from said danger, and without any fault or negli-
12 gence of the plaintiff or her said child, he, the said Christopher, was killed, and whereby and by reason of the death of said Christopher so caused as aforesaid the plaintiff has sustained damages in the sum of five thousand dollars.

Fourth.

For a fourth cause of action:

1.

That at the times hereinafter named the defendant was a corporation organized under the laws of the United States and was in possession of and operating a certain railroad in the State of Colorado known as the Denver, South Park and Pacific railroad, together with its tracks, cars, locomotives, section-houses, and other appurtenances thereto belonging.

That before the happening of the matters and things hereinafter stated the said defendant company had caused to be constructed on said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of certain of its employees working in said locality and passing through the same in the course of their employment; that the said building was of a fragile

structure and in nowise calculated or constructed so as to resist a snow-slide coming upon it, or any other body of such weight or size.

2.

That at the times hereinafter mentioned the plaintiff was the mother of one Catherine Doyle, who lost her life as hereinafter stated; that the father of said Catherine Doyle died on or about the 8th day of April, A. D. 1880; that said Catherine at the time of her said death, hereinafter mentioned, was twenty years of age and had no husband or child living, but was unmarried, and up to
13 the time of her death resided and made her home with plaintiff and aided and assisted plaintiff in providing a support for herself and family and was then aiding and assisting the plaintiff in the discharge of her duties as keeper of the section-house hereinafter mentioned, of which the defendant then and for a long time previous had knowledge.

3.

That on or about the 5th day of November, A. D. 1883, at the instance and request of defendant and for the mutual benefit of herself and defendant, the plaintiff undertook and agreed with defendant to keep for it, during its will and pleasure, its section-house situated at or near Woodstock, on the line of said railroad, in the county of Chaffee and State of Colorado; that by the said agreement between her and the defendant she was to provide and furnish board at said section-house for such section hands and other employees of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the persons so to be furnished with such board, but the defendant was to aid and assist the plaintiff in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with board; that the plaintiff thereupon, to wit, on the day and year last aforesaid, moved into said section-house with her family and immediately entered upon the discharge of her duties as the keeper thereof and remained there and continued to discharge such duties thereat until the occurrence of the snow-slide hereinafter mentioned.

4.

That said section-house was situated in a mountainous region, near the base of large mountains, and in a locality where snow was accustomed to fall in the winter season of each year to great
14 depths, and where snow-slides had occurred and were liable to occur, and where during the spring or winter next previous to the fifth day of November, 1883, a great snow-slide did occur, by reason whereof the said section-house was an unsafe and dangerous place to live in during the winter and spring time of each year; that the defendant had knowledge and well knew of the facts and danger aforesaid at and before the time the plaintiff so moved into said section-house with her family as aforesaid, but failed and neglected then or at any time to notify or inform the

plaintiff or the said Catherine thereof, and wilfully withheld such knowledge and information from each and both of them during the whole time the plaintiff with her family so kept and occupied said section-house, although it was the duty of defendant to notify the plaintiff and her said daughter and each of them of said danger; that the defendant also failed and neglected to erect or construct at any time a suitable break or barrier to guard and protect the said section-house and its inmates from said danger, but left the same and them wholly unprotected; that the plaintiff and said Catherine and each of them were and remained wholly ignorant of such danger and of the occurrence of such previous snow-slide during the whole time the plaintiff so kept said house.

5.

That on or about the 10th day of March, A. D. 1884, the snow, having previously thereto fallen in great quantities and to a great depth about said section-house and upon the mountains and mountain sides immediately surrounding the same, broke loose from the mountain sides above said section-house and slid down in large bodies against and upon the said section-house and crushed in the roof and other parts thereof and then and there killed her said daughter Catharine, then in said house, and likewise a number of the other inmates thereof, whereby and by reason of the said wrongful and fraudulent acts, neglect, and default of defendant in failing and neglecting to notify the plaintiff and her said daughter or either of them of said danger, and in wilfully withholding all knowledge of said danger from the plaintiff and her said daughter, in building said house in said place of danger and in suffering the same to remain there, and in failing and neglecting to erect or construct a suitable break or barrier to guard and protect said house and its inmates from such danger, and without any fault or negligence on the part of either the plaintiff or her said daughter, she, the said Catharine, was killed, whereby and by reason of the death of her said daughter, caused as aforesaid by defendant, she, the plaintiff, has sustained damages in the sum of five thousand dollars.

Fifth.

For a fifth cause of action:

1.

That at the times hereinafter mentioned the defendant was a corporation duly organized under the laws of the United States and was in possession of and operating a certain railroad in the State of Colorado known as the Denver, South Park and Pacific railroad, together with its tracks, cars, locomotives, section-houses, and other appurtenances thereto belonging.

That before the happening of the matters and things hereinafter stated the said defendant company had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by

said company for the boarding and lodging of certain of its em-
ployees working in said locality and passing through the
16 same in the course of their employment; that the said build-
ing was of a fragile structure and in nowise calculated or constructed so as to resist a snow-slide coming upon it, or any other body of such weight or size.

2.

That at the times hereinafter mentioned the plaintiff was the mother of one Marcella Doyle, who was killed by a snow-slide, as hereinafter stated; that the father of the plaintiff's said daughter Marcella died on or about the 8th day of April, A. D. 1880; that her said daughter Marcella was at the time of her death, hereinafter mentioned, fourteen years of age and unmarried and resided and had a home with plaintiff — aided and assisted and was then aiding and assisting the plaintiff in providing a support for herself and family; that the defendant well knew at and during the time the plaintiff moved into and kept the section-house of the defendant, as hereinafter stated, that her said daughter resided with plaintiff.

3.

That on or about the 5th day of November, A. D. 1883, at the instance and request of defendant and for the mutual benefit of herself and defendant, the plaintiff undertook and agreed with defendant to keep for it, during its will and pleasure, its section-house situated at or near Woodstock, on the line of said railroad, in the county of Chaffee and State of Colorado; that by the said agreement between her and defendant the plaintiff was to provide and furnish board at said section-house for such section hands and other employees of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the person so furnished with such board, but the defendant was to aid and assist the plaintiff
in collecting her pay for such board by stopping and retain-
17 ing the same for her out of the wages of those so furnished
with such board; that the plaintiff thereupon, to wit, on the day and year last aforesaid, moved into said section-house with her family and immediately entered upon the discharge of her duties as the keeper thereof and remained there and continued to discharge such duties until the occurrence of the snow-slide hereinafter mentioned.

4.

That said section-house was situated in a mountainous region, near the foot or base of large mountains, and in a locality where snow was accustomed to fall in the winter season of each year to great depths, and where snow-slides had occurred and were liable to occur, and where, during the spring or winter next previous to the 5th day of November, A. D. 1883, a great snow-slide did occur, by reason whereof the said section-house was an unsafe and dangerous place to live in during the winter and spring time of each year;

that the defendant had knowledge and well knew of the facts and danger aforesaid at and before the time the plaintiff moved into said section-house with her family as aforesaid, but failed and neglected then or at any time to notify or inform the plaintiff or her said daughter thereof, and wilfully withheld such knowledge and information from each and both of them during the whole time the plaintiff so kept and occupied said house, notwithstanding it was the duty of defendant to notify the plaintiff and her said daughter of said danger; that the defendant also failed and neglected to erect or construct at any time a suitable break or barrier to guard and protect the said section-house and the plaintiff and her family from said danger, but left the same and them wholly unprotected from said danger during the whole time they so kept and occupied said house; that the plaintiff and her said daughter and
18 each of them were and remained during the whole time the plaintiff so kept said house wholly ignorant of said danger and of the fact of the occurrence of such previous snow-slides.

5.

That on or about the 10th day of March, A. D. 1884, the snow, having previously fallen in great quantities and to a great death about said section-house and upon the mountains and mountain sides surrounding the same, broke loose from the mountain sides above said section-house and slid down in large bodies against and upon the said house and crushed in the roof and other parts thereof and killed her said daughter Marcella, then in said house, and a large number of other inmates thereof, whereby and by reason of the said wrongful and fraudulent acts, neglects, and defaults of the defendant in failing and neglecting to notify the plaintiff and her said daughter or either of them of said danger, and in wilfully withholding knowledge or notice of said danger from the plaintiff and her said daughter, in building said house at such place, in suffering the same to remain there, and in failing and neglecting to erect or construct a suitable break or barrier to guard and protect the said house and the plaintiff and her said daughter from said danger, and without any fault or negligence on the part of either the plaintiff or her said daughter, she, her said daughter Marcella, was killed, whereby and by reason of the death of her said daughter, so caused as aforesaid by the defendant, the plaintiff has sustained damages in the sum of five thousand dollars.

Sixth.

For a sixth cause of action:

1.

That at the times hereinafter named the plaintiff was a
19 corporation duly organized under the laws of the United States and was in the possession of and operating a certain railroad known as the Denver, South Park and Pacific railroad, in

the State of Colorado, together with its tracks, cars, locomotives, section-houses, and othe- appurtenances thereto belonging.

That before the happening of the matters and things hereinafte-stated the said defendant company had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of certain of its employees working in said locality and passing through the same in the course of their employment; that the said building was of a fragile structure and in nowise calculated or constructed so as to resist a snow-slide coming upon it or any other body of such weight or size.

2.

That at the times hereinafter mentioned the plaintiff was the mother of one Maggie Doyle, who was killed by a snow-slide, as hereinafter stated; that the father of said Maggie Doyle died on or about the 8th day of April, 1880; that her said daughter Maggie at the time of her death, hereinafter mentioned, was twelve years of age and unmarried and resided up to the time of her death with plaintiff and rendered the plaintiff what assistance she was capable of in providing a support for herself and family; that the defendant well knew at and during the time the plaintiff moved into and kept the section-house of defendant, as hereinafter stated, that her said daughter Maggie resided with her.

3.

That on or about the 5th day of November, A. D. 1883, at
20 the instance and request of the defendant and for the mutual benefit of herself and defendant, the plaintiff undertook and agreed with defendant to keep for it, during its will and pleasure, its section-house situated at or near Woodstock, on the line of said railroad, in the county of Chaffee and State of Colorado; that by the said agreement between her and the defendant the plaintiff was to provide and furnish board at said section-house for such section hands and other employees of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the person so furnished with such board, but the defendant was to aid and assist the plaintiff in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with such board; that plaintiff thereupon, to wit, on the day and year last aforesaid, moved into said section-house with her family and immediately entered upon the discharge of her duties as the keeper thereof and remained there and continued to discharge such duties until the occurrence of the snow-slide hereinafter mantioned.

4.

That said section-house was situated in a mountainous region, near the foot or base of large mountains, and in a locality where snow was accustomed to fall in the winter season of each year to

great depths, and where snow-slides had occurred and were liable to occur, and where during the spring or winter next previous to the 5th day of November, 1883, a great snow-slide did occur, by reason whereof the said section-house was an unsafe and dangerous place to live in during the winter and spring time of each year; that the defendant well knew of the facts and danger aforesaid at and before the time the plaintiff moved into said section-house with her family as aforesaid, but failed and neglected then or at any
21 time to notify or inform the plaintiff or her said daughter thereof, and wilfully withheld such knowledge and information from each and both of them during the whole time the plaintiff so kept and occupied the said section-house, notwithstanding it was the duty of the defendant to notify the plaintiff and also her said daughter of said danger; that the defendant also failed and neglected to erect or construct at any time a suitable break or barrier to protect and guard said house and the plaintiff and her said daughter from said danger, but carelessly left the said house and them exposed to said danger during the whole time the plaintiff so kept and occupied said house; that the plaintiff and her said daughter and each of them were and remained during the whole time the plaintiff kept said house as aforesaid wholly ignorant of said danger and of the fact of such previous snow-slide having occurred.

5.

That on or about the 10th day of March, A. D. 1884, the snow, having previously fallen in great quantities and to a great depth about said section-house and upon the mountains and mountain sides immediately surrounding the same, broke loose from the mountain sides above said house and slid down in large bodies against and upon said house and crushed in the roof and other parts thereof and killed her said daughter Maggie, then in said house, and also a large number of the other inmates thereof, whereby and by reason of the said wrongful and fraudulent acts, neglects, and defaults of the defendant in failing and neglecting to notify the plaintiff or her said daughter or either of them of said danger, and in wilfully with-olding notice or knowledge thereof from the plaintiff and her said daughter, in building said house at said place and in suffering the same to remain there, and in failing and neg-
22 lecting to erect or construct a break or barrier to protect the said house and the plaintiff and her said daughter from said danger, and without any fault or negligence on the part of either the plaintiff or her said daughter, she, the said Maggie, was killed, whereby and by reason of the death of her said daughter so caused as aforesaid by the defendant the plaintiff has sustained damages in the sum of five thousand dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of thirty thousand dollars and her costs of suit.

(Signed) A. H. DE FRANCE AND
PATTERSON & THOMAS,
Attorneys for Plaintiff.

(Endorsed:) No. 1881. U. S. circuit court, district of Colorado. Marcella Doyls *vs.* The Union Pacific Railway Company. Complaint. Filed Jan. 7, 1886. (Signed) Edward F. Bishop, clerk. A H. De France and Patterson & Thomas, attorneys.

And the said summons is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

MARCELLA DOYLE, Plaintiff,
vs.
23 THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Complaint filed in the clerk's office this seventh day of January, A. D. 1886.

The President of the United States of America to the Union Pacific Railway Company, Greeting:

You are hereby notified that an action has been brought in said court by Marcella Doyle, plaintiff, against you, as defendant, to recover the sum of $30,000, damages sustained by the plaintiff, to wit, the death of her three sons and three daughters, viz., Martin Doyle, Andrew Doyle, Christopher Doyle, Catharine Doyle, Marcella Doyle, and Maggie Doyle, all of whom were killed in a certain section-house erected and owned by plaintiff on the line of its road at Woodstock, in said district, said section-house being occupied by plaintiff and having been crushed by a snow-slide on the 10th day of March, 1884, as more fully set forth and described in the complaint filed herein and to which reference is here made, and for the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after the summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default according to the prayer of the said complaint and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said
24 circuit court, at the city of Denver, in said district, this seventh day of January, A. D. 1886, and of the Independence of the United States the 110th year.

[Seal Cir. C't U. S., Dist. of Colo.]

(Signed) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

DENVER, *January* —, *A. D.* 1886.

I hereby certify that I received the within writ on the 7th day of January, A. D. 1884, and that I have personally served the same upon the said defendant, The Union Pacific Railway Company, by delivering to J. K. Choate, superintendent of defendant company for Colorado division, personally a true copy of the within writ, at Denver, county of Arapahoe, on the 13th day of January, A. D. 1886; no president, vice-president, secretary, treasurer, general manager, or other officer of said defendant company found in my district.

This writ therefore returned executed as the law directs this 14 day of January, A. D. 1886.

(Signed) WALTER A. SMITH, *Marshal,*
By E. F. DEAN, *Deputy Marshal.*

(Endorsed:) Gen. No., 1881. Circuit court of the United States for the district of Colorado. Marcella Doyle, plaintiff, *vs.* The
25 Union Pacific R'y Co., defendant. Summons. Filed this 14th day of Jan'y, A. D. 1886. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. A. H. De France, of Golden, Patterson & Thomas, of Denver, attorney for plaintiff.

And afterwards and on, to wit, the 1st day of February, A. D. 1886, came the said defendant, by Teller and Orahood, its attorney-, and filed in said court and in said cause its answer to the complaint heretofore filed herein; and the said answer is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States, District of Colorado.

MARCELLA DOYLE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. }

Now comes the defendant, and for answer to plaintiff's complaint herein denies that the defendant company had caused to be constructed on said line of railway, at a station called Woodstock, a certain one-story frame building and section-house intended to be used by said company for boarding and lodging of its employees, as in said complaint stated; denies that said supposed building was of a fragile structure, and denies that it was in nowise calculated or constructed so as to resist a snow-slide coming upon it or to resist any other body of such weight or size.

Defendant has not and cannot obtain sufficient knowledge or in-

formation on which to base a belief as to whether or not the
26 plaintiff was a widow lady or the mother of one Martin Doyle, nor as to whether or not said Martin Doyle was killed, nor as to whether or not the father of said Martin Doyle was dead, nor as to whether or not the said Martin Doyle had no wife or child living at the time of his death, nor as to whether or not he was unmarried or of the age of twenty-three years or any other age, nor as to whether or not he resided or made his home with plaintiff or had aided or assisted or was then aiding or assisting plaintiff in the support of herself or family, and therefore denies each and every allegation of the complaint in that behalf, and denies that the defendant had any knowledge whatever of such facts, if the same existed.

Defendant denies that at the *the* time in said complaint stated or at any other time, at the instance or request of defendant or otherwise or for the mutual benefit of plaintiff and defendant, the plaintiff undertook or agreed to keep for it, during its will and pleasure, said section-house; denies that by said agreement between plaintiff and defendant plaintiff was to board at said section-house such section hands or other employees or servants of defendant as it should desire, at any rate or price whatever, but admits that if plaintiff was to board any person whomsoever the board therefor was to be paid for by the persons so to be boarded and not by defendant; denies that defendant was to aid or assist plaintiff in collecting her pay for such board in any way or manner whatever; denies that plaintiff moved into said section-house with her family and children and entered upon the discharge of any duties whatever by or in pursuance of any contract or arrangement with defendant, and denies that she at any time discharged such duties as in said complaint stated
27 by or in pursuance of any contract with defendant. Defendant denies that said section-house was situated in a mountainous region, near the foot of large mountains, in a locality where snow was and had been accustomed to fall in the winter season to great depths, or where dangerous snow-slides were liable to occur or had occurred, or where a great snow-slide did occur at the time stated in said complaint or at any other time, and denies that said section-house was by any reason whatever an unsafe or dangerous place in which to live during the winter and spring time; denies that defendant was aware or had any knowledge whatever at any time of any such facts so stated in said complaint; denies that neither the plaintiff nor her said son, Martin Doyle, had any notice or knowledge whatsoever, at or before the occurrence of the snow-slide mentioned, of all the facts relating to said section-house, its locality, and the dangers connected therewith, and, on the contrary, alleges that the same were open and patent, and that the said plaintiff and her said son, Martin Doyle, had full knowledge and information in regard to all of the facts relating thereto and had full and complete means of knowing all the dangers attending the said situation, and that they and each of them voluntarily entered into and took upon themselves the risks of the same; denies that at any time defendant knew that said Martin was living in the section-house aforesaid or aiding or assisting plaintiff in or about her duties and the business

of keeping said section-house; denies that it was the duty of defendant to notify plaintiff of said danger, and denies that it was its duty to notify said Martin thereof; denies that the defendant neglected its duty in this respect, and denies that defendant did not notify plaintiff and her said son thereof, and denies that defendant knowingly, willfully, or otherwise withheld all or any information thereof from plaintiff or from her said son Martin or from either of them.

Denies that defendant neglected or failed to erect or construct a suitable break or barrier to protect said section-house and the plaintiff and her family against said danger; denies that the defendant carelessly or negligently or otherwise left the said section-house and the plaintiff and her family unprotected against any danger whatever at any time.

Defendant denies that at the time mentioned in said complaint or at any other time the snow had fallen in great quantities or to a great depth about said section-house and upon the mountains and mountain sides immediately above and surrounding said section-house, as in said complaint stated, and denies that the same broke loose from the mountain side above said section-house and slid down in large bodies against or upon said section-house or crushed in the roof or other parts thereof, and denies that said Martin Doyle was then and there killed in said house; denies that the defendant was guilty of any wrongful or fraudulent acts, neglects, or defaults, as in said complaint stated, in not notifying the plaintiff or her said son Martin of any danger whatever, or of any wilful with-olding any notice or knowledge thereof from the plaintiff or her said son Martin or from either of them, or in building the *the* said house in said place or keeping the same there, or in not erecting a suitable break or barrier to protect the said section-house and its inmates from said danger, as in said complaint stated, or otherwise; denies that any injury suffered by plaintiff or her said son Martin was without their fault or negligence; denies that plaintiff has sustained any damages whatever by reason of anything in said com-
29 plaint stated or by, through, or on account of any act, default, or negligence on the part of defendant.

Defendant, further answering said complaint, as to the second cause of action, denies that the defendant had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of certain of its employees working in said locality and passing through the same in the course of their employment, as in said complaint stated, and denies that said building was of a fragile structure, and denies that it was in nowise calculated or constructed so as to resist a snow-slide coming upon it or any other body of such weight or size.

Defendant has not and cannot obtain sufficient knowledge or information on which to base a belief as to whether or not the plaintiff was the mother — Andrew Doyle, nor as to whether or not said Andrew Doyle was killed, nor as to whether or not the father of

said Martin Doyle was dead, nor as to whether or not at the time of his death said *said* Andrew was nineteen years of age, nor as to whether or not he had no wife or child living, nor as to whether or not he was unmarried, nor as to whether or not he resided or made his home with plaintiff or had aided or assisted or was then aiding or assisting plaintiff in the support of herself or family, and therefore denies each and every allegation of the complaint in that behalf, and denies that the defendant had any knowledge whatever of such facts, if the same existed.

Defendant denies that at the time of his death or previous thereto the said Andrew Doyle had been engaged at work for wages in the employ of defendant as a section hand on said railroad whereon the section-house mentioned was located, and denies that the said section-house was the place provided and designated by
30 the defendant as the place at which said Andrew was to board and lodge during the time he was so engaged at work for defendant.

Defendant denies that at the time in said complaint stated or at any other time, at the instance or request of defendant or otherwise or for the mutual benefit of plaintiff and defendant, the plaintiff undertook or agreed to keep for it, during its will and pleasure, said section-house; denies that by said agreement between plaintiff and defendant plaintiff was to furnish board at said section-house to such agents, employés, or servants of defendants as it should desire, at any rate or price whatever, but admits that if plaintiff was to board any person whomsoever the board therefor was to be paid for by the persons so to be boarded and not by defendant; denies that defendant was to aid or assist plaintiff in collecting her pay for such board in any way or manner whatever; denies that plaintiff moved into said section-house with her family and entered upon the discharge of any duties whatever by or in pursuance of any contract or arrangement with defendant, and denies that she at any time discharged such duties, as in said complaint stated, by or in pursuance of any contract with defendant.

Defendant denies that said section-house was situated in a mountainous region, near the base of large mountains, in a locality where snow was and had been accustomed to fall in the winter season to great depths, or where snow-slides had occurred or were liable to occur, or where a great snow-slide did occur at the time stated in said complaint or at any other time, and denies that said section-house was by any reason whatever an unsafe or dangerous place to live in during the winter and spring time; denies that defendant was aware or had any knowledge whatever at any time of any such facts so stated in said complaint; denies that the defendant ever
31 neglected or failed to inform or notify plaintiff or her said son Andrew or either of them thereof, or wilfully or otherwise withheld such notice or information from either of them during the time stated in said complaint or any other time, and denies that it was its duty to so inform them or either of them; denies that the defendant failed or neglected at any time to construct a suitable break or barrier to protect said section-house and its in-

mates against said danger, or negligently or otherwise left the same wholly or at all unprotected; denies that the plaintiff or said Andrew or either of them were at any time or so remained wholly ignorant of said danger or of the occurrence of such previous snow-slide or were ignorant of any or all of the facts relating to said section-house, its locality, and the dangers connected therewith, and, on the contrary, alleges that the same were open and patent, and that the said plaintiff and her said son, Andrew Doyle, had full knowledge and information in regard to all of the facts relating thereto and had full and complete means of knowing all the dangers attending the said situation, and that they and each of them voluntarily entered into and took upon themselves the risks of the same.

Defendant denies that at the time mentioned in said complaint or at any other time the snow had fallen in great quantities or to a great depth about said section-house and on the mountain sides next to and immediately surrounding said section-house, and denies that the same broke loose from the mountain sides above said section-house, as in said complaint stated, and slid down in large bodies against or upon said section-house or crushed in the roof or other parts thereof, and denies that said Andrew Doyle was then and there killed in said house; denies that the defendant was guilty
of any wrongful or fraudulent acts, neglects, or defaults, as
32 in said complaint stated, in not notifying said plaintiff or her
said son Andrew of any danger whatever, or in withholding any information thereof from them or either of them, or in building said house in said place or in suffering the same to remain there, or in not erecting a suitable break or barrier to protect the said section-house against said danger, as in said complaint stated, or otherwise; denies that any injury suffered by plaintiff or her said son Andrew was without their fault or negligence; denies that plaintiff has sustained any damages whatever by reason of anything in said complaint stated or by, through, or on account of any act, default, or negligence on the part of defendant.

Defendant, further answering, as to the third cause of action in said complaint—

Denies that the defendant had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of certain of its employés working in said locality and passing through the same in the course of their employment, and denies that said supposed building was of a fragile structure, and denies that it was in nowise calculated or constructed so as to resist a snow slide coming upon it or to resist any other body of such weight or size.

Defendant has not and cannot obtain sufficient knowledge or information on which to base a belief as to whether or not the plaintiff was the mother of one Christopher Doyle, nor as to whether or not said Christopher lost his life, nor as to whether or not the father of said Christopher Doyle was dead, nor as to whether or not the said

Christopher Doyle was at the time of his death a minor under
33 the age of ten years, nor as to whether or not he was living with the plaintiff at that time, as in said complaint stated, and therefore denies each and every allegation of the complaint in that behalf, and denies that the said defendant ever had any knowledge whatever of such facts, if the same existed.

Defendant denies that at the time stated in said complaint or at any other time, at the instance or request of defendant or otherwise or for the mutual benefit of plaintiff and defendant, the plaintiff undertook or agreed to keep for it during its will and pleasure said section-house; denies that by said agreement between plaintiff and defendant plaintiff was to provide and furnish board at said section-house for such section hands or other employés of defendant as it should desire, at any rate or price whatever, but admits that if plaintiff was to board any person whomsoever the board therefor was to be paid for by the persons so to be boarded and not by defendant; denies that defendant was to aid or assist plaintiff in collecting her pay for such board in any way or manner whatever; denies that plaintiff moved into said section-house with her family and entered upon the discharge of any duties whatever by or in pursuance of any contract or arrangement with defendant, and denies that she at any time discharged such duties, as in said complaint stated, by or in pursuance of any contract with defendant.

Defendant denies that said section-house was situated in a mountainous region, near the base of large mountains, or in a locality where snow was accustomed to fall in the winter season to great depths, or where snow-slides had occurred or were liable to occur or where a great snow-slide did occur at the time stated in said complaint or at any other time, and denies that said section-house was by any reason whatever an unsafe or dangerous place to
34 live in during the winter and spring time; denies that defendant was aware or had any knowledge whatever at any time of any such facts or danger so stated in said complaint; denies that the defendant ever failed or neglected to inform or notify the plaintiff thereof or the said Christopher or either of them or wilfully or otherwise withheld such notice or information from either or both of them during the time stated in said complaint or any other time, and denies that it was its duty to inform the plaintiff or her said child thereof; denies that the plaintiff and her said son or either of them were or remained during the time stated in the complaint or any time wholly or at all ignorant of said danger or of the fact of the occurrence of such previous snow-slide, as in the complaint stated, or otherwise, or were ignorant of all or any of the facts relating to said section-house, its locality, and the dangers connected therewith, and, on the contrary, allege that the same were open and patent, and that the said plaintiff and her said son, Christopher Doyle, had full knowledge and information in regard to all of the facts relating thereto and had full and complete means of knowing all the dangers attending the said situation, and that they and each of them voluntarily entered into and took upon themselves the risks of the same; denies that the defendant ever failed or

neglected to erect or construct a break or barrier to protect the said section-house or its inmates against said danger or left the same wholly or at all unprotected.

Defendant denies that at the time mentioned in said complaint or at any other time the snow had fallen in great quantities or to a great depth about said section-house and upon the mountains and mountain sides immediately surrounding said section-house, as in said complaint stated, and denies that the same broke loose
35 from the mountain sides above said section-house and slid down in large bodies against or upon said section-house or crushed in the roof or other parts thereof, and denies that the said Christopher Doyle was then and there killed in said house; denies that the defendant was guilty of any wrongful or fraudulent acts, neglects, or defaults, as in said complaint stated, in failing or neglecting to notify the plaintiff and her said child or either of them of any danger whatever, or in wilfully with-olding any notice or knowledge thereof from plaintiff or her said son Christopher or from either of them, or in building the said house in said place or in suffering it to remain there, or in failing or neglecting to erect or construct a suitable break or barrier to guard and protect said house and its inmates from said danger; denies that any injury — was suffered by plaintiff or her said son Christopher was without their fault or negligence; denies that the plaintiff has sustained any damages whatever by reason of anything in said complaint stated or by, through, or on account of any act, default, or negligence on the part of defendant.

Defendant, further answering said complaint, as to the fourth cause of action, denies that the defendant had caused to be constructed on the line of said railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of its employés working in said locality and passing through the same in the course of their employment, as in said complaint stated, and denies that said supposed building was of a fragile structure, and denies that it was in nowise calculated or constructed so as to resist a snow-slide coming upon it or to resist any other body of such weight or size.
36 Defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether or not the plaintiff was the mother of one Catherine Doyle, nor as to whether or not said Catharine Doyle was killed, nor as to whether or not the father of said Catherine Doyle was dead, nor as to whether or not the said Catharine Doyle at the time of her death was of the age of twenty years, nor as to whether or not she then had no husband or child living, nor as to whether or not she was unmarried, nor as to whether or not she resided or made her home with plaintiff or had aided or assisted or was then aiding or assisting plaintiff in the discharge of her duties, as stated in said complaint or otherwise, and therefore denies each and every allegation of the complaint in that behalf, and denies that the defendant ever had any knowledge whatever of such facts, if the same existed.

Defendant denies that at the time in said complaint stated or at

any other time, at the instance or request of defendant or otherwise or for the mutual benefit of plaintiff and defendant, the plaintiff undertook or agreed with defendant to keep for it during its will and pleasure said section-house.

Denies that by said agreement between plaintiff and defendant plaintiff was to provide or furnish board at said section-house for such section hands or other employés of the defendant as it should desire, at any rate or price whatever, but admits that if plaintiff was to board any person whomsoever the board therefor was to be paid for by the persons so to be boarded and not by defendant.

Denies that defendant was to aid or assist plaintiff in collecting her pay for such board in any way or manner whatever; denies that plaintiff moved into said section-house with her family and entered upon the discharge of any duties whatever by or in
37 pursuance of any contract or arrangement with defendant, and denies that she at any time discharged such duties, as in said complaint stated, by or in pursuance of any contract with defendant.

Defendant denies that said section-house was situated in a mountainous region, near the base of large mountains, or in a locality where snow was or had been accustomed to fall in the winter season to great depths, or where snow-slides had occurred or were liable to occur, or *whether* a great snow-slide did occur at the time stated in said complaint or at any other time, and denies that said section-house was by any reason whatever an unsafe or dangerous place in which to live during the winter and spring time; denies that defendant was aware or had any knowledge whatever at any time of any such facts or danger so stated in said complaint; denies that defendant ever failed or neglected to inform or notify the plaintiff or the said Catharine thereof, or willfully or otherwise withheld such knowledge or information from either or both of them during the time stated in said complaint or any other time, and denies that it was its duty to inform the plaintiff and her said daughter or either of them of said danger; denies that the defendant ever failed or neglected to erect or construct a suitable break or barrier to guard and protect the said section-house or its inmates against said danger, or left the same or them wholly or at all unprotected; denies that the plaintiff and her said daughter or either of them *were* remained wholly or at all ignorant of such danger or of the occurrence of such previous snow-slide during the time stated in the complaint or during any time, as in said complaint stated or otherwise, or were ignorant of all or any of the facts relating to said section-house, its locality, and the dangers connected therewith; and, on the contrary,
38 alleges that the same were open and patent, and that the said plaintiff and her said daughter, Catharine Doyle, had full knowledge and information in regard to all of the facts relating thereto and had full and complete means of knowing all the danger attending the said situation, and that they and each of them voluntarily entered into and took upon themselves the risks of the same.

Defendant denies that at the time mentioned in said complaint or at any other time the snow had fallen in great quantities or to a

great depth about said section-house and upon the mountain and mountain sides immediately surrounding the same, as in said complaint stated, and denies that the said snow broke loose from the mountain sides above said section-house and slid down in large bodies against or upon said section-house or crushed in the roof or other parts thereof, and denies that the said Catharine Doyle was then and there killed in said house; denies that the defendant was guilty of any wrongful or fraudulent acts, neglects, or defaults, as in said complaint stated, in not notifying the plaintiff or her said daughter Catharine of any danger whatever, or in willfully withholding any notice or knowledge thereof from plaintiff or her said daughter Catharine, or from either of them, or in building said house in said place or in suffering the same to remain there, or in failing or neglecting to erect or construct a suitable break or barrier to guard or protect said house or its inmates from such danger, as in said complaint stated or otherwise; denies that any injury suffered by plaintiff or her said daughter Catharine was without their fault or negligence; denies that plaintiff has sustained any damages whatever by reason of anything in said complaint stated or by, through, or on account of any act, default, or negligence on the part of defendant.

39 Defendant, further answering said complaint, as to the fifth cause of action—

Denies that defendant had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of certain of its employés working in said locality and passing through the same in the course of their employment, as in said complaint stated, and denies that said supposed building was of a fragile structure, and denies that it was in nowise calculated or constructed so as to resist a snow-slide coming upon it or to resist any other body of such weight or size.

Defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether or not the plaintiff was the mother of one Marcella Doyle, nor as to whether or not the said Marcella Doyle was killed, nor as to whether or not the father of Marcella Doyle was dead, nor as to whether or not the said Marcella Doyle was at the time of her death fourteen years of age, nor as to whether or not she was unmarried or resided or had a home with plaintiff or had aided or assisted or was then aiding or assisting plaintiff in the support of herself or family, and therefore denies each and every allegation of the complaint in that behalf, and denies that the defendant well knew or had any knowledge that said Marcella Doyle resided with plaintiff at the time mentioned or at any other time, and denies that the defendant had any knowledge whatever of such fact, if the same existed.

Defendant denies that at the time in said complaint stated or at any other time, at the instance or request of defendant or otherwise or for the mutual benefit of plaintiff and defendant, the

40 plaintiff undertook or agreed with defendant to keep for it

during its will and pleasure said section-house; denies that by said agreement between plaintiff and defendant plaintiff was to provide or furnish board at said section-house for such section hands or other employés of the defendant as it should desire, at any rate or price whatever, but admits that if plaintiff was to board any person whomsoever the board therefor was to be paid for by the persons so to be boarded and not by defendant; denies that defendant was to aid or assist plaintiff in collecting her pay for such board in any way or manner whatever; denies that plaintiff moved into said section-house with her family and entered upon the discharge of any duties whatever by or in pursuance of any contract or arrangement with defendant, and denies that she at any time discharged such duties as in said complaint stated by or in pursuance of any contract with defendant.

Defendant denies that said section-house was situated in a mountainous region, near the foot or base of large mountains, or in a locality where snow was or had been accustomed to fall in the winter season to great depths, or where snow-slides had occurred or were liable to occur, or where a great snow-slide did occur at the time stated in said complaint or at any other time, and denies said section-house was by any reason whatever an unsafe or dangerous place in which to live during the winter and spring time; denies that the defendant had any knowledge or well knew at any time of any such facts or danger so stated in the complaint, or ever failed or neglected to notify or inform the plaintiff or her said daughter, Marcella Doyle, thereof, or willfully or otherwise withheld such knowledge or information from either or both of them during the time
41 stated in said complaint or at any other time, and denies that it was its duty to notify the plaintiff and her said daughter or either of them of said danger; denies that the defendant ever failed or neglected to erect or construct a suitable break or barrier to guard and protect the said section-house and the plaintiff and her family from said danger or ever left the same or them wholly or at all unprotected; denies that the plaintiff and her said daughter or either of them were or remained wholly or at all ignorant of said danger during the time stated in the complaint or during any time or were ignorant of any of the facts relating to said section-house, its locality, and the dangers connected therewith, and, on the contrary, allege- that the same were open and patent, and that the said plaintiff and her said daughter, Marcella Doyle, had full knowledge and information in regard to all of the facts relating thereto and had full and complete means of knowing all the dangers attending the said situation, and that they and each of them voluntarily entered into and took upon themselves the risks of the same.

Defendant denies that at the time mentioned in said complaint or at any other time the snow had fallen in great quantities or to a great depth about said section-house and upon the mountain- and mountain sides surrounding the same, as in said complaint stated, and denies that the same broke loose from the mountain sides above said section-house and slid down in large bodies against or upon

said section-house or crushed in the roof or other parts thereof, and denies that said Marcella Doyle was then and there killed in said house; denies that the defendant was guilty of any wrongful or fraudulent acts, neglects, or defaults, as in said complaint stated, in
42 failing or neglecting to notify the plaintiff or her said daughter Marcella of any danger whatever, or in willfully withholding any knowledge or notice thereof from plaintiff or her said daughter Marcella or from either of them, or in building said house in such place, or in suffering the same to remain there, or in failing or neglecting to erect or construct a suitable break or barrier to guard and protect the said house and plaintiff and her said daughter from said danger, as in said complaint stated, or otherwise; denies that any injury suffered by plaintiff or her said daughter Marcella was without their fault or negligence; denies that the plaintiff has sustained any damages whatever by reason of anything in said complaint stated or by, through, or on account of any act, default, or negligence on the part of defendant.

Defendant, further answering said complaint, as to the sixth cause of action—

Denies that the defendant had caused to be constructed on the said line of railway, at a station called Woodstock, a certain one-story frame building called a section-house, intended to be used by said company for the boarding and lodging of certain of its employés working in said locality and passing through the same in the course of their employment, as in said complaint stated; denies that the said building was of a fragile structure, and denies that it was in nowise calculated or constructed so as to resist a snow-slide coming upon it or to resist any other body of such weight or size.

Defendant has not and cannot obtain sufficient knowledge or information on which to base a belief as to whether or not the plaintiff was the mother of one Maggie Doyle, nor as to whether or not said Maggie Doyle was killed, nor as to whether or not the father of said Maggie Doyle was dead, nor as to whether or not the said
43 Maggie Doyle was at the time of her death twelve years of age or unmarried, nor as to whether or not up to the time of her death or at any time she resided with plaintiff, nor as to whether or not she rendered the plaintiff what assistance she was capable of or any assistance in providing a support for herself and family, and therefore defendant denies each and every allegation of the complaint in that behalf, and denies that the defendant had any knowledge whatever of such facts, if the same existed.

Defendant denies that at the time in said complaint stated or at any other time, at the instance or request of defendant or otherwise or for the mutual benefit of plaintiff and defendant, the plaintiff undertook or agreed with defendant to keep for it, during its will and pleasure, said section-house; denies that by said agreement between plaintiff and defendant plaintiff was to provide or furnish board at said section-house for such section hands or other employés of the defendant as it should desire, at any rate whatever, but admits that if plaintiff was to board any persons whomsoever the board therefor was to be paid for by the persons so to be boarded and not

by defendant; denies that defendant was to aid or assist plaintiff in collecting her pay for such board in any way or manner whatever; denies that plaintiff moved into said section-house with her family and entered upon the discharge of any duties whatever by or in pursuance of any contract or arrangement with defendant, and denies that she at any time discharged such duties, as in said complaint stated, by or in pursuance of any contract with defendant.

Defendant denies that said section-house was situated in a mountainous region, near the foot or base of large mountains, or in a locality where snow was accustomed to fall in the winter season to great depths, or where snow-slides had occurred or were liable
44 to occur, or where a great snow-slide did occur at the time stated in said complaint or at any other time, and denies that said section-house was by any reason whatever an unsafe or dangerous place to live in during the winter and spring time; denies that defendant was aware or had any knowledge whatever at any time of any such facts or dangers so stated in the complaint; denies that defendant ever failed or neglected to notify or inform the plaintiff or the said Maggie Doyle thereof or willfully or otherwise withheld such knowledge or information from either or both of them during the time in said complaint stated or during any time, and denies that it was its duty to inform the plaintiff or her said daughter of said danger; denies that the defendant ever failed or neglected to erect or construct a suitable break or barrier to protect and guard said house and the plaintiff and her said daughter or either of them from said danger or carelessly or otherwise left the said house or them exposed to said danger; denies that the plaintiff and her said daughter or either of them were or remained wholly or at all ignorant of said danger or of the fact of such previous snow-slide having occurred during the time stated in said complaint or during any time or were ignorant of any of the facts relating to said section-house, its locality, and the dangers connected therewith, and, on the contrary, allege that the same were open and patent, and that the said plaintiff and her said daughter, Maggie Doyle, had full knowledge and information in regard to all of the facts relating thereto and had full and complete means of knowing all the dangers attending the said situation, and that they and each of them voluntarily entered into and took upon themselves the risks of the same.

Defendant denies that at the time mentioned in said com-
45 plaint or at any other time the snow had fallen in great quantities or to a great depth about said section-house and upon the mountains and mountain sides immediately surrounding the same, as in said complaint stated, and denies that the said snow broke loose from the mountain sides above said section-house and slid down in large bodies against or upon said section-house or crushed in the roof or other parts thereof, and denies that said Maggie Doyle was then and there killed in said house; denies that the defendant was guilty of any wrongful or fraudulent acts, neglects, or defaults, as in said complaint stated, in failing or neglecting to notify the plaintiff or her said daughter Maggie of any danger whatever, or in will-

fully or otherwise withholding notice or knowledge thereof from the plaintiff or her said daughter or from either of them, or in building said house at said place, or in suffering the same to remain there, or in failing or neglecting to erect or construct a break or barrier to protect the said house and the plaintiff and her said daughter from said danger, as in said complaint stated, or otherwise; denies that any injured suffered by plaintiff or her said daughter Maggie was without their fault or negligence; denies that plaintiff has sustained any damages whatever by reason of anything in said complaint stated or by, through, or on account of any act, default, or negligence on the part of defendant.

Defendant, further answering, alleges that the manner of the construction of said section-house and the locality thereof and the formation of the mountains surrounding the same and the liability of snow-storms and accumulation of snow thereon and the liability of snow-slides occurring in the vicinity of said house, and that the same might be struck, injured, and demolished thereby and the inmates thereof injured, and all the surrounding circumstances
46 and facts connected therewith were, at all times mentioned in said complaint, fully and completely known to the said plaintiff and to each and all of her said children mentioned in said complaint; and defendant alleges that plaintiff and her said children, knowing all of said facts and circumstances, voluntarily entered into said section-house and lived in and kept the same and transacted business therein of her and their own free will and accord, knowing all the dangers thereof, without any inducement whatever on behalf of defendant, and that the said plaintiff and each and all of her said children had full and complete means of knowledge in regard to all the said facts at and during all the time and times mentioned in said complaint. Wherefore defendant alleges that whatever injury or damages plaintiff and her said children may have suffered was caused by and through and on account of their own acts and not by, through, or on account of any act, default, or negligence of defendant.

Wherefore defendant prays judgment to be dismissed and to recover its costs in this behalf expended.

(Signed) TELLER & ORAHOOD,
Attorneys for Defendant.

(Endorsed:) No. 1881. U. S. C. court, district of Colorado. Marcella Doyle *vs.* U. P. R'y Co. Answer. Filed Feb. 1, 1886. (Signed) Edward F. Bishop, clerk. Teller & Orahood, att'ys for defendant.

And afterwards and on, to wit, the 17th day of February, A. D. 1887, the same being one of the regular juridical days of the
47 November term, A. D. 1886, of said court—present, the Honorable Moses Hallett—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial.

MARCELLA DOYLE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1881. Action for Damages.

At this day comes the said plaintiff, by A. H. De France, Esq., her attorney, and the said defendant, by Willard Teller, Esq., its attorney also comes.

And thereupon comes a jury, to wit, William M. Bond, Taylor Green, B. L. James, Samuel B. Wright, Maurice Wolf, Thomas Crisman, A. M. Baker, John W. Knox, John S. Henrich, William Martin, W. R. Blove, Daniel McGonigal, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to separate, to meet the court at its next incoming.

48 And afterwards and on, to wit, the 18th day of February, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit,

Order: Trial Continued.

MARCELLA DOYLE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1881. Action for Damages.

At this day come again the said parties, by their attorneys, respectively.

And the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to separate, to meet the court at its next incoming.

And afterwards and on, to wit, the 19th day of February, A. D. 1887, the same being one of the regular juridical days of the No-

vember term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit,

Order: Trial Concluded. Judgment.

49 MARCELLA DOYLE *vs.* THE UNION PACIFIC RAILWAY COMPANY. } 1881. Action for Damages.

At this day comes again the said parties, by their attorneys, respectively.

And the jurors heretofore impaneled and sworn in this cause being now all here present and in the jury-box, the trial of the issues herein joined is resumed.

And the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards and on this same day come again the said jurors and on their oaths do say they find for the defendant.

And afterwards and on, to wit, the 5th day of March, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for New Trial Denied.

MARCELLA DOYLE *vs.* THE UNION PACIFIC RAILWAY COMPANY. } 1881. Action for Damages.

At this day comes the said plaintiff, by T. M. Patterson, Esq., her attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

50 And the motion of the said plaintiff for a new trial of the issues herein joined having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore, on motion of the said defendant, it is considered by the court that the said defendant go hence hereof without day and have and recover of and from the said plaintiff its costs by it in this behalf laid out and expended, to be taxed, and execution therefor.

And, on her motion, day until thirty (30) days from this day is allowed the said plaintiff to file herein her bill of the exceptions reserved by her upon the trial of the issues herein joined.

And afterwards and on, to wit, the 4th day of April, A. D. 1887, came again the said plaintiff, by her attorney aforesaid, and filed in said court and in said cause her bill of exceptions reserved by her upon the trial of the issues herein joined; and the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States for the District of Colorado.

51 MARCELLA DOYLE, Plaintiff, *vs.* THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Bill of Exceptions.

Be it remembered that on the trial of this cause, at the November term, A. D. 1886, of the said circuit court, the defendant admitted, and such admissions were received in evidence before the jury—

"That the plaintiff was at the several times named in the complaint a widow and the mother of the said Martin Doyle, Andrew Doyle, Christopher Doyle, Catharine Doyle, Marcella Doyle, and Maggie Doyle, mentioned and named in the complaint as the children of the plaintiff and as having each and all been killed by a snow-slide at Woodstock in the month of March, A. D. 1884.

"That her husband and the father of said children had died previously to their death; that each of said children was of the age and sex stated in the complaint; was each unmarried and had no child or children, and had each lived with their said mother, making their home with her up to the time of their death, and were each then living with the plaintiff, aiding and assisting her in and about making a living and in and about her duties and labors in the keeping of the section-house of the defendant at Woodstock, in the county of Chaffee and State of Colorado, where said children were killed; that said children were all killed while in said section-house, on the 10th day of March, A. D. 1884, by a snow-slide, which then and there occurred from the mountain side above said section-house; that said section-house was built and used by the defendant as and for a section-house and a place at which the section hands
52 of the defendant who should work on said section could board and lodge.

"That on or about the 5th day of November, A. D. 1883, at the instance and request of the defendant and for the mutual benefit of herself and the defendant, the plaintiff undertook and agreed with the defendant to keep for it, during its will and pleasure, its section-house situated at or near Woodstock, on the line of its railroad, in the county of Chaffee and State of Colorado; that by the said agreement between her and the defendant the plaintiff was to provide and furnish board at said section-house for such section hands and other employees of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the persons so fur-

nished with such board, but the defendant was to aid and assist the plaintiff in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with such board; that plaintiff thereupon, to wit, on the said 5th day of November, A. D. 1883, moved into said section-house with her family and entered upon the discharge of her duties as the keeper thereof, and remained there in the discharge of such duties until the occurrence of the snow-slide, on the 10th of March, A. D. 1884; that the defendant did not at any time notify or apprise the plaintiff or either of her said children or cause her or either of them to be notified or apprised of the danger of a snow-slide or snow-slides or of the liability of a snow-slide or snow-slides at such place where said section-house then was or in that locality." And the plaintiff, further to maintain the issues of her part, introduced evidence tending to show that said section-house was a one-story frame building and was constructed in 1882, about the time that said railroad was first oper-
53 ated in that section of the country; was situated in the mountains, near the base of a high and steep mountain and in a place subject to snow-slides and dangerous on that account; that the sides of the mountain at the base of which was the house in question were marked by the tracks of former snow-slides, but only those familiar with snow-slides and their effects would know what they meant; that the defendant was aware of said danger at and before the time it engaged the plaintiff to keep its said section-house; that the plaintiff and her said children had never before resided in a region of country subject to snow-slides and had no knowledge of snow-slides or of their indications or of the dangers incident thereto and was not aware of the particular danger in question; that there was a prominence or hip on this mountain side, about ten or twelve hundred feet above the section-house, which cut off a view of the mountain side above said hip from the section-house or its immediate vicinity; that above said hip there was a large depression or draw on the mountain side extending from said hip to the summit, into which great quantities of snow fell and drifted during the winter season of each year, thus tending to create snow-slides of danger to persons in said section-house or its vicinity; that this danger was not apparent even to a person having knowledge of snow-slides and their causes without a view or examination of this mountain side above said hip; that the altitude of said section-house was about 10,200 feet, and of the summit of said mountain nearly 12,000 feet; that the snow-fall there was great in the winter season of each year, and that depressions on the mountain side were filled with snow by drifting; that the snow-slide of March 10th, 1884, which killed the said children, proceeded from this depression above
54 said hip; that a snow-slide of less dimensions and of less scope and extent occurred there in February, 1883, in the same place and from the same source, which reached to within about two hundred feet of said section-house and of which the defendant had knowledge at the time thereof.

That the attention of the superintendent of the construction of said railroad and of said section-house was called to the fact of such

danger, at or about the time said section-house was built, by one of the civil engineers of said defendant who assisted in locating the line of said railroad.

That her said son, Andrew Doyle, was an employee of the defendant—a section-hand on the same section where said section-house was located—at the time he was so killed by said snow-slide; that the plaintiff and her said children were in said section-house at the time the said children were killed, and that neither of said children were aware of said danger before the said snow-slide of March 10th, 1884, occurred.

That through this prominence or hip on the mountain side there was a chasm or draw from twenty to thirty feet wide, which continued on down to the section-house, but became wider after leaving the hip; that with this draw another draw united about midway between the section-house and the said hip and formed one draw from their point of union to the section-house.

That this mountain is a part of the range of mountains known as the Continental Divide, which divides the waters of the Atlantic from those of the Pacific. Att his point above Woodstock station the course of the mountain is nearly east and west. This railroad passes this mountain by means of a tunnel called "Alpine tunnel," which is to the westward of a line north of Woodstock and descends this mountain at a heavy grade, along the side thereof about
55 midway between the section-house and the said hip on the mountain (which hip is termed a projection of rocks by some of the witnesses), and passes on to the eastward of Woodstock a considerable distance, where it turns and, forming a kind of horseshoe shape, runs back again past Woodstock, but between the section-house and said hip—the section-house being below and distant from this lower track about two hundred and thirty feet—and the two tracks forming this horseshoe are both between the section-house and said hip and on a direct line from the section-house up to the hip. The two tracks are about five hundred feet apart, the upper track being about seventy-feet higher in point of altitude where they cross this line from the section-house to the hip on the mountain side above; that there was a water-tank on the upper side of the lower track fifty or sixty feet to the westward of the section-house, which water-tank was injured by the snow-slide of February, 1883.

That the snow-slide of March 10th, 1884, spread out as it descended the mountain, so that where it passed over the lower railroad track its space in width was six or seven hundred feet, and the section-house was not far from the center of said snow-slide track.

That the contour of this mountain, beginning at the section-house and ascending the mountain, is about as follows, to wit: Above the section-house it slopes slowly to the first railroad track; then there is a rock-slide; then there is a bench above that and on the same level of the upper railroad track, and above that a steep gorge, and on each side of said gorge there is a thin belt of timber, and between these belts of timber and along the gorge there is a

space from three to four hundred feet in width of nothing
56 but rock, with a very steep slope, and above this slope some very steep rocks (the hip on the mountain side), and above this hip is a large basin or depression extending on up the mountain side three or four thousand feet long to the summit of the mountain, which has an elevation or altitude of about 11,500 feet, the mountain side above the hip being very steep, having a slope of more than thirty-three degrees, and from the hip down there is quite a precipitous piece of rock, not perpendicular, but quite steep, and after or below that the slope is at an angle of about twenty-five degrees. In the basin above the hip there is no timber and in and about the section-house there is a space of eight or nine hundred feet square *of* on which there is no timber except three or four trees.

That the timber on the mountain side was sparse and scattered; that only a few trees were carried down by the snow-slide; that snow-slides do not always follow beaten tracks made by former snow-slides on the same mountain side, but frequently depart therefrom; that the snow-slide of March 10th, 1884, separated into broken fragments or divisions before reaching the base of the mountain, one of which struck the section-house, resulting in the injuries complained of.

That the winter of 1883–'4 was severer and the snow fell some deeper than the winter previous thereto, and that it snowed heavily and continuously from about the first of March to the 10th of March, 1884, and the trains had ceased to run on account of the snow; that ordinarily in the winter season the snow was from five to seven feet deep in said locality in places where it did not drift and after it had settled compactly; that it drifted greatly, filling up basins and depressions on the mountain sides; that there were rock-slides and existing evidences of former snow-slides on this mountain side above said section-house.

57 That the snow-slide of February, 1883, deposited snow and débris on the upper track of the railroad above said section house from twenty to twenty-five feet deep, and for a considerable space of time from then, during the remainder of that winter and the following spring, the said railroad was not operated on account of the snow.

And the defendant, to maintain the issues on its part, introduced evidence tending to prove that said section-house was built below the said tracks and behind, and protected by a thick growth of timber above and between said section-house and the mountain; that there were no marks or tracks of former snow-slides directly above or in the vicinity of said section-house; that the defendant was not aware of any danger from snow-slides at the place where the section-house was built, but, on the contrary, that the officers of the company had carefully examined the locality where the same was built and the contour of the mountains above the same to the summit of the range, and that said section-house was built at that place because the officers of the company thought that it was — safe place and could not be endangered by snow-slides, which were apt to occur

in that part of the country; that the prominence or hip spoken of was a protection against snow-slides which might occur on the mountain sides above said section-house; that an examination of the ground, timber, and rocks in the vicinity of where the house was built and above, on the mountain side, showed that there had not been a snow-slide there for at least two hundred years; that the snow-slide of March 10th, 1884, was caused by a storm of unprecedented severity and duration, and that the same came down through the timber above said house, breaking down and carrying with it standing trees, from bushes up to trees two feet in
58 diameter; that the snow-slide mentioned as occurring in February, 1883, came down a considerable distance to the north of where the one came down in 1884, and that the snow-slide in 1883 did no damage except to cover up a short distance of the railroad track and break in some boards of the house under the water-tank; that the attention of the superintendent of construction of said railroad was not called by any one to the fact of there being any danger from snow-slides at the place where said section-house was built, but that the conversation or notice referred to was in regard to a place a mile or more farther up Quartz creek; that the said Andrew Doyle had been an employé of the defendant as a section hand, but had quit work some days before on account of the road being blockaded by snow and all attempts to open it having been abandoned, and for ten days or more before the snow-slide no work whatever was being done by defendant on said road for a distance of several miles each way from said Woodstock; that said prominence or hip on the mountain side mentioned by the witnesses tended to protect said section-house and its immediate locality from snow-slides; that there was no chasm or draw immediately above said section-house, and that whatever formation of that kind there was on said mountain was a distance of two hundred feet or more north of said section-house; that said section-house was broken down by said snow-slide of March 10th, 1884, by a spreading out of the snow as it came down the mountain, and that said section-house was on the southerly side of said snow-slide; that the gorge referred to is simply an opening a few feet wide in the ridge of rock referred to as the hip or prominence; that a short distance above said prominence the general timber line of the country is reached, above which no timber occurs; that there was a considerable
59 amount of timber between said section-house and the first railroad track and a thick growth of large timber immediately above the first railroad track, extending up some distance towards the second track of the loop, and some scattering timber above the upper track; that there are no rock-slides or existing evidences of former snow-slides on the mountain sides immediately above said section-house.

And the foregoing was all the evidence in the case.

And thereupon the plaintiff moved the court to charge the jury as follows:

If the jury believe from the evidence that the section-house in question was in a place of danger from snow-slides, and that the de-

fendant was aware of said danger at the time it engaged the plaintiff to keep its said section-house, then the defendant should have notified the plaintiff of said danger; and if you further find from the evidence that the defendant did not notify or apprise the plaintiff of said danger, and that the plaintiff used due care in the premises and was not aware of said danger, then your verdict should be in favor of the plaintiff.

But the court refused to give to the jury the above and foregoing instruction; to which refusal of the court plaintiff, by her counsel, then and there excepted.

And thereupon the court charged the jury as follows:

It is a rule of law, gentlemen, that whenever an injury comes to any one through the wrongful act or negligence of another, that the person so injured may have a right of action to recover damages for the injury so sustained, and the statute enacts a rule which did not obtain prior to the statute, that "if death result from the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would if death had not ensued entitle
60 the party injured to maintain an action to recover damages in respect thereof, then and in every such case the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the party injured." And in another section it is provided by whom the action may be maintained as the survivor whenever death is caused in the manner specified in this section.

In this instance the plaintiff has brought two actions—one in her own right for the injury which she herself sustained in consequence of the snow-slide at this place in the month of March, 1884, and one for injuries resulting to her from the death of her children. The first is founded upon the general principal which I have mentioned and the second upon this statute. The situation of the parties in respect to the controversy does not arise out of the application of any principals peculiarly applicable to railroads, and the circumstance that the defendant is a railroad company in this instance does not call for the application of any of the rules which are usually applied in cases of accident upon railroads.

And thereupon the court did further charge the jury as follows:

The railroad company, it would seem, had provided this section-house, and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertook also to collect from the man and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies, who erect a boarding-house near their mines and there employ somebody to keep it. The use of the house may be given
61 without rent, and the company may undertake to collect the money from the workmen in the mine, just as the railroad company did in this case, and it might occur in a hundred instances—probably does occur in very many—as in factories, where the conveniences of living are not sufficient in and about the works, the company or individuals carrying on the work may keep a house of

this kind and rent it to any one who shall board their men, or give the house free of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant.

To the giving of which instruction the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

The circumstance that the plaintiff here paid no rent for the premises is not at all controlling. In that respect she was to render services there which stood in lieu of rent between the parties, and the principals applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior tenant had occupied such a house having contagious disease and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage results to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord; and so in one case—I do not recall the report in which it is given, but I believe I have seen it—in which a house was immediately above an excavation which had been made below for a
62 mine, and a caving occurred and the house fell into the excavation, the tenant going there without knowledge of the defect existing underground, if the landlord had knowledge and concealed the fact from him he may be liable to an action in respect to a matter of that kind. As you may see, the right of action results from the concealment on the part of the landlord of a fact which he ought to make known to the tenant and not otherwise unless there is some wrong-doing—some omission of duty—on the part of the landlord towards his tenant. There is no right of action, and if the defect be one which is as apparent to the tenant as to the landlord, open to the observation of all, then there is no right of action.

And to the giving of which instruction the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

Now, to apply this rule to the cases of this kind there can be no doubt that the railroad company undertaking to build a railroad through the country where the mountains were very precipitous and where it was very difficult to build a road or operate it when built—as the scheme itself was one which was lawful, which the company could properly engage in, just as men may carry on mining wherever they can find mines—that they were only under one obligation, and that was to use due care in respect to the location of any building which they might require, and, having used such care with reference to the property of the company, there can be no liability to any one for anything that may result thereafter.

And to the giving of which instruction the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

They are not responsible for the condition of the country
63 as that it was subject to snow-slides. They were not bound to desist from the building of the railroad or from putting up a section-house because it was subject to snow-slides. They could do these things without liability to any one if they were done in a careful and prudent manner, just as a man who goes upon the mountain side to mine; he may be in a very dangerous locality, he may be in a place, as in some places down in the San Juan country, which is swept by snow-slides almost every winter; in going to such place, if he uses such care as he can, if he selects what appears to him to be the best place for his buildings and the like, he is not liable to his men for any danger that may result to them from occupying his premises, because the occupation is a lawful one; he has a right to prosecute his mining notwithstanding the dangers to which everybody is exposed who goes there.

And to the giving of which instructions the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road if they thought proper to do so. If a section-house was needed there all that was required of them was to put it in the place which seemed to be the best, which in the exercise of ordinary care and prudence seemed to be the best suited for the work.

To the giving of which instruction the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road if they thought proper to do so. If a section-house was needed there
64 all that there was required of them was to put it in the place which seemed to be the best, which in the exercise of ordinary care and prudence seemed to be the best suited for the work.

To which instruction of the court the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

Now, the question is whether this was done or whether there was anything in the circumstances which, if it was done in the first instance—whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred. If they used ordinary diligence and care in locating the house in this place and maintaining it there, then there can be no liability, however unfortunate the plaintiff may have been, in being there at the time of this snow-slide.

To which instructions of the court the plaintiff, by her counsel, then and there excepted.

And the court further charged the jury as follows:

Another illustration may be given which may indicate somewhat to you the rule of law which may be applicable to such a case. A year or two ago in the Black cañon of the Gunnison river a rock,

slide came down the mountain side and it was very near coming on the train which was passing. I do not know whether it was just before the train came or just afterwards, but at all events the accident was avoided by only a few hundred feet. Now, if that slide had come down upon the train there cannot be any question whatever there would have been no liability upon the part of the company for that. It was one of the dangers of the country in which their road was carried on, and they could not be responsible
65 for an accident of that kind, using ordinary care and prudence to avoid it, and a snow-slide is something of the same character.

To the giving of which instruction by the court plaintiff, by her counsel, then and there excepted.

And the court further instructed the jury as follows:

If we advert to the building of houses just under a hill, as occurs in these mountain towns often, there may be an earth-slide from above which will come down upon such houses, and the question is whether the party building a house in such a place has been guilty of carelessness and negligence in so doing—if that was a danger he ought to have apprehended whether he would be responsible to a tenant who should go into the house to locate in it in such a place.

And to the giving of which instruction by the court the plaintiff, by her counsel, then and there excepted.

And the court further instructed the jury as follows:

Now, gentlemen, if upon that you think this company was guilty of negligence in putting the section — in this place and maintaining it there, the right of action on the part of the plaintiff is a very doubtfu question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it ought to be submitted to the jury at all; but I have decided for the present at least to submit it to your judgment, since it may be more desirable that it should be determined by business men than by any officer of the court; so it is submitted for your consideration with this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through which the road was built, and bearing in
66 mind that the company had the right to build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock-slides, or whatever dangers might be found in that country, and that using care and prudence in that regard, with a view to the dangers to which they were exposed, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary they should use.

And to the giving of which instruction by the court plaintiff, by her counsel, then and there excepted; that each and all of the above exceptions was and were taken while the jury was at the bar and before they retired to consider as to their verdict.

And the court further instructed the jury as follows:

If you find against the company, then the question will be as to the measure of damages. As to that I have very little to say to you.

In the action which the plaintiff herself has brought, which she herself has sustained, she has testified before you as to the nature and extent of the injury. It has disabled her to some extent, unquestionably, and she has lost some property. What may be your estimate of those things I cannot assume to say, and as to the others, the children, of course, that is a matter which rests also in your judgment. They were, all of them, people who could work, and the estimate of the law is what she might receive from them in case their lives were prolonged in the way of support and maintenance as she would go on in life. They were working people, and, of course, the estimate, whatever it is, must be according to their capacity to earn money.

And the foregoing were all the instructions given by the court to the jury in the case.

And thereupon the jury retired to consider of their verdict,
67 and, having considered of their verdict, they returned into court and returned a verdict in favor of defendant.

Thereafter and upon the 2nd day of March, 1887, the plaintiff filed her motion for a new trial in said causes; which motion is as follows, to wit:

UNITED STATES OF AMERICA, }
State of Colorado, } *ss:*

In the Circuit Court of the United States for the District of Colorado.

MARCELLA DOYLE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

And now comes the plaintiff, by A. H. De France and Patterson & Thomas, her attorneys, and moves the court to set aside the verdict of the jury and to grant the plaintiff a new trial herein for the following reasons, to wit:

1. That the verdict is contrary to the evidence.
2. That the verdict is against the weight of the evidence.
3. That the verdict is contrary to law.
4. That the court erred in rejecting proper evidence offered by plaintiff.
5. That the court erred in admitting improper evidence offered by defendant.
6. That the court erred in refusing the instruction asked by plaintiff.
7. That the court erred in its instructions to the jury.

8. That the court erred in its charge to the jury in the fol-
68 lowing parts and each thereof of said, charge lettered from "A" to "J," inclusive:

(A.) The railroad company, it would seem, had provided this section-house and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertook also to collect from the men and to pay over to the person who might keep it the money which would come due for board. In that

respect the situation of the parties is about the same as with many mining companies who erect a boarding-house near their mines and there employ somebody to keep it. The use of the house may be given without rent and the company may undertake to collect the money from the workmen in the mine just as the railroad company did in this case, and it might occur in a hundred instances, probably does occur in very many, as in factories where the conveniences of living are not sufficient in and about the works; the company or individuals may keep a house of this kind and rent it to any one who shall board their men or give the house free of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant.

(B.) The circumstance that the plaintiff here paid no rent for the premises is not at all controlling. In that respect she was to render service there which stood in lieu of rent between the parties, and the principals applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior tenant has occupied such a house having a contagious disease and
69 the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage result to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord. As you may see, the right of action results from the concealment on the part of the landlord of a fact which he ought to make known to the tenant and not otherwise. Unless there is some wrong-doing, some omission of duty on the part of the landlord towards his tenant, there is no right of action; and if the defect be one which is as apparent to the tenant as to the landlord—open to the observation of all—then there is no right of action.

(C.) Now, to apply this rule to cases of this kind: There can be no doubt that the railroad company undertaking to build a railroad through the country where the mountains were very precipitous and where it was very difficult to build a road or operate it when built, as the scheme was one which was lawful, which the company could properly engage in, just as men may carry on mining wherever they can find mines—that they were under only one obligation, and that was to use due care in respect to the location of any building which they might require, and, having used such care with reference to the property of the company, there can be no liability to any one for anything that may result thereafter.

(D.) They are not responsible for the condition of the country as that it was subject to snow-slides; they were not bound to desist from the building of the railroad or from putting up a section-house because it was subject to snow-slides; they could do these things without liability to any one, if they were done in a careful and prudent manner, just as a man who goes on a mountain side

to mine; he may be in a very dangerous locality; he may
70 be in a place, as in some places down in the San Juan country, which is swept by snow-slides almost every winter. In going to such place, if he uses such care as he can, if he selects what appears to him to be the best place for his buildings and the like, he is not liable to his men for any danger that may result to them from occupying his premises, because the occupation is a lawful one; he has a right to prosecute his mining notwithstanding the dangers to which everybody is exposed who goes there.

(E.) So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road, if they thought proper to do so. If a section-house was needed there all that was required of them was to put it in the place which seemed to be best, which, in the exercise of ordinary care, and prudence, seemed to be the best suited for the work.

(F.) Now, the question is whether this was done or whether there was anything in the circumstances which if it was done in the first instance—whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred. If they used ordinary diligence and care in locating the house in this place and maintaining it there, then there can be no liability, however unfortunate the plaintiff may have been in being there at the time of this snow-slide.

(G.) Another illustration may be given which may indicate somewhat to you the rule of law which may be applicable to such a case. A year or two ago in the Black cañon of the Gunnison river a rock-slide came down the mountain side and it was very near coming upon a train which was passing. I do not know whether it was
71 just before the train came or just afterwards, but at all events the accident was avoided by only a few hundred feet. Now, if that slide had come down upon the train there cannot be any question whatever there would have been no liability upon the part of the company for that. It was one of the dangers of the country in which their road was carried on, and they could not be responsible for an accident of that kind, using ordinary care and prudence to avoid it, and a snow-slide is something of the same character.

(H.) If we advert to the building of houses just under a hill, as occurs in these mountain towns often, there may be an earth-slide from above which will come down upon such houses, and the question is whether the party building a house in such a place has been guilty of carelessness and negligence in so doing—if that was a danger he ought to have apprehended, whether he would be responsible to a tenant who should go into the house for locating it in such a place.

(J.) Now, gentlemen, if upon that you think this company was guilty of negligence in putting the section-house in this place and maintaining it there, the right of action on the part of the plaintiff is a very doubtful question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it ought to

be submitted to the jury at all; but I have decided for the present, at least, to submit it to your judgment, since it may be more desirable that it should be determined by business men than by an officer of the court; so it is submitted for your consideration, with this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through which the road was built, and bearing in mind that the company had the right to
72 build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock-slides, or whatever dangers might be found in that country, and that using care and prudence in that regard, with a view to the dangers to which they were exposed, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary they should use.

(S'g'd) A. H. DE FRANCE,
PATTERSON & THOMAS,
Attorneys for Plaintiff.

But the court afterwards, on, to wit, the 5th day of March, A. D. 1887, the same having been argued and submitted, overruled said motion for a new trial; to which ruling of the court the plaintiff, by her counsel, then and there excepted; and thereupon the court rendered judgment on the verdict in favor of the defendant, to which the plaintiff by her counsel then and there excepted.

And forasmuch as the matters and things herein set forth do not appear of record in said cause, the plaintiff tenders this her bill of exceptions to this honorable court, and prays that it may be signed and sealed by the court and made a part of the record in this cause, which is accordingly done this 4th day of April, A. D. 1887.

(Signed) MOSES HALLETT, [SEAL.]
Dist. Judge.

(Endorsed:) No. 1881. U. S. circuit court, district of Colorado. Marcella Doyle *vs.* The Union Pacific Railway Co. Bill of exceptions. Filed Apr. 4, 1887. (Signed) Edward F. Bishop, clerk.

73 And afterwards and on, to wit, the 19th day of February, A. D. 1889, came again the said plaintiff, by her attorney aforesaid, and filed in said court and in said cause her bond and sued out of said court a writ of error and citation to the Supreme Court of the United States; and the said bond is in words and figures as follows, to wit:

Bond.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, Marcella Doyle as principal, and James M. Doyle, Thomas M. Patterson, and Allison H. De France, as sureties, are held and firmly bound unto the Union

Pacific Railway Company in the full and just sum of one thousand dollars, to be paid to the said The Union Pacific Railway Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the November term, A. D. 1886, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between Marcella Doyle, plaintiff, and The Union Pacific Railway Company, defendant—

Judgment was rendered against the said Marcella Doyle, and the said Marcella Doyle, plaintiff, having obtained a writ of error to reverse the judgment of said court, and a citation directed to the said The Union Pacific Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be
74 held at Washington, D. C., on the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said Marcella Doyle, plaintiff, shall prosecute said writ to effect and answer all damages and costs if she fails to make good her plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) MARCELLA her x mark. DOYLE. [SEAL.]
" JAMES M. DOYLE, [SEAL.]
" THOMAS M. PATTERSON. [SEAL.]
" ALLISON H. DE FRANCE. [SEAL.]

Witness- as to Marcella Doyle's mark:
(Signed) A. H. DE FRANCE.
" JAMES M. DOYLE.

Approved Feb'y 19, 1889.
(Signed) MOSES HALLETT, *Judge.*

(Endorsed:) Gen. No., 1881. Circuit court of the United States, district of Colorado. Marcella Doyle *vs.* The Union Pacific Railway Company. Bond on writ of error, $1,000.00. Filed this 19th day of Feb'y, A. D. 1889. (Signed) William A. Willard, clerk, by F. W. Tupper, deputy clerk.

And the said writ of error, with the return of the clerk thereto, is next hereto attached, to wit:

Writ of Error.

75 Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court between Marcella Doyle, plaintiff, and The Union Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said Marcella Doyle, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the same at Washington, D. C., on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal United States Circuit Court, District of Colorado.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 113 year.

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Allowed by—
MOSES HALLETT, *Judge.*

75½ [Endorsed:] Gen. No., 1881. Circuit court of the United States for district of Colorado. Marcella Doyle, plaintiff in error, *vs.* The Union Pacific Railway Company. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 19th day of Feb'y, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. A. H. De France, attorney for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 2d day of August, A. D. 1889.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk.*

76 And the said citation is next hereto attached, to wit:

Citation.

77 Citation, U. S. circuit court.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to The Union Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein Marcella Doyle is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 19th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

MOSES HALLETT, *Judge.*

78 [Endorsed:] Gen. No., 1881. Circuit court of the United States, district of Colorado. Marcella Doyle, plaintiff in error, *vs.* The Union Pacific Railway Company, defendant in error. Citation. Filed in circuit court of the U. S. this 21st day of Feb'y, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. A. H. De France, attorney for plaintiff in error.

Service of copy of the within citation on the Union Pacific Railway Co. this 20th day of Feb'y, 1889, is hereby admitted.

TELLER & ORAHOOD,
Att'ys for U. P. R'y Co.

79 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein Marcella Doyle was plaintiff and The Union Pacific Railway Company was defendant, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this second day of August, A. D. 1889.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Assignment of Errors and Prayer for Reversal.

80 Supreme Court of the United States, of the October Term, in the Year of our Lord one Thousand Eight Hundred and Eighty-nine.

MARCELLA DOYLE, Plaintiff in Error,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Marcella Doyle, by Patterson & Thomas, her attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. The circuit court erred in refusing to give to the jury the following instruction asked by the plaintiff in error, to wit: "If the jury believe from the evidence that the section-house in question was in a place of danger from snow-slides, and that the defendant was aware of said danger at the time it engaged the plaintiff to keep its said section-house, then the defendant should have notified the plaintiff of said danger; and if you further find from the evidence that the defendant did not notify or apprise the
81 plaintiff of said danger, and that the plaintiff used due care in the premises and was not aware of said danger, then your verdict should be in favor of the plaintiff."

2nd. The circuit court erred in instructing the jury as follows, to wit:

"The railroad company, it would seem, had provided this section-house and were willing to give the use of it to any one who would undertake to board their men in this locality, and undertake also to collect from the men and to pay over to the person who might keep it the money which would come due for board. In that respect the situation of the parties is about the same as with many mining companies who erect a boarding-house near their mines and then employ somebody to keep it. The use of the house may be given without rent and the company may undertake to collect the money from the workmen in the mine just as the railroad company did in this case, and it might occur in a hundred instances, probably does occur in very many, as in factories where the conveniences of living are not sufficient in and about the works; the company or individuals carrying on the work may keep a house of this kind and rent it to any one who shall board their men or give the house free of rent in consideration of the undertaking of the person keeping it to accommodate the men in that way, and the position of the parties was in general that of landlord and tenant."

82 3rd. The circuit court erred in instructing the jury as follows, to wit:

"The circumstance that the plaintiff here paid no rent for the building is not at all controlling. In that respect she was to render services there which stood in lieu of rent between the parties, and the principles applicable to it are pretty well defined in some cases which have arisen between landlords and their tenants in respect to the obligations and duties resting on the landlord towards his tenant, as in some cases in which houses have been rented and which were subject to a contagious disease, as where a prior tenant has occupied such a house having a contagious disease and the house is given to another tenant without notice of the fact that it has been so occupied. It is said in such case that if any special damage results to a tenant from going into a house which was subject to such influences a right of action may exist on the part of the tenant against the landlord; and so in one case—I do not recall the report in which it is given, but I believe I have seen it—in which a house was immediately above an excavation which had been made below for a mine and a caving occurred and the house fell into the excavation. The tenant going there without knowledge of the defect existing underground, if the landlord had knowledge and concealed the fact from him he may be liable to an action in respect to a matter of that kind. As you may see, the right of action results

83 from the concealment on the part of the landlord of a fact which he ought to make known to the tenant and not otherwise. Unless there is some wrong-doing, some omission of duty on the part of the landlord towards his tenant, there is no right of action; and if the defect be one which is as apparent to the tenant as to the landlord—open to the observation of all—then there is no right of action."

4th. The circuit court erred in instructing the jury as follows, to wit:

"Now, to apply this rule to cases of this kind: There can be no

doubt that the railroad company undertaking to build a railroad through the country where the mountains were very precipitous and where it was very difficult to build a road or operate it when built, as the scheme itself was one which was lawful, which the company could properly engage in, just as men may carry on mining wherever they can find mines—that they were under only one obligation, and that was to use due care in respect to the location of any building which they might require, and, having used such care with reference to the property of the company, there can be no liability to any one for anything that may result thereafter."

5th. The circuit court — in instructing the jury as follows, to wit:

84 "They are not responsible for the condition of the country as that it was subject to snow-slides; they were not bound to desist from the building of the railroad or from putting up a section-house because it was subject to snow-slides; they could do these things without liability to any one, if they were done in a careful or prudent manner, just as a man who goes upon the mountain side to mine; he may be in a very dangerous locality; he may be in a place, as in some places down in the San Juan country, which is swept by snow-slides almost every winter. In going to such place, if he uses such care as he can, if he selects what appears to him to be the best place for his buildings and the like, he is not liable to his men for any danger that may result to them from occupying his premises, because the occupation is a lawful one; he has a right to prosecute his mining notwithstanding the dangers to which everybody is exposed who goes there."

6th. The circuit court erred in instructing the jury as follows, to wit:

"So with the railroad company in going over this mountain, it was a lawful enterprise to go over it and build their road, if they thought proper to do so. If a section-house was needed there all that was required of them was to put it in the place which seemed to be best, which, in the exercise of ordinary care and prudence, seemed to be the best suited for the work."

85 7th. The circuit court erred in instructing the jury as follows, to wit:

"Now, the question is whether this was done or whether there was anything in the circumstances which if it was done in the first instance—whether there was anything in the circumstances developed afterwards which ought to have influenced the railroad company to abandon the place and leave it before this accident occurred. If they used ordinary diligence and care in locating the house in this place and maintaining it there, then there can be no liability, however unfortunate the plaintiff may have been in being there at the time of this snow-slide."

8th. The circuit court erred in instructing the jury as follows, to wit:

"Another illustration may be given which may indicate somewhat to you the rule of law which may be applicable to such a case. A year or two ago in the Black cañon of the Gunnison river a rock-

slide came down the mountain side and it was very near coming on the train which was passing. I do not know whether it was just before the train came or just afterwards, but at all events the accident was avoided by only a few hundred feet. Now, if that slide had come down upon the train there cannot be any question whatever there would have been no liability upon the part of
86 the company for that. It was one of the dangers of the country in which their road was carried on, and they could not be responsible for an accident of that kind, using ordinary care and prudence to avoid it, and a snow-slide is something of the same character."

9th. The circuit court erred in instructing the jury as follows, to wit:

"If we advert to the building of houses just under a hill, as occurs in these mountain towns often, there may be an earth-slide from above which will come down upon such houses, and the question is whether the party building a house in such a place has been guilty of carelessness and negligence in so doing—if that was a danger he ought to have apprehended, whether he would be responsible to a tenant who should go into the house to locate in it in such a place."

10th. The circuit court erred in instructing the jury as follows, to wit:

"Now, gentlemen, if upon that you think this company was guilty of negligence in putting the section-house in this place and maintaining it there, the right of action on the part of the plaintiff is a very doubtful question indeed. It is so far doubtful that it is a matter of considerable difficulty to determine whether it
87 ought to be submitted to the jury at all; but I have decided for the present, at least, to submit it to your judgment, since it may be more desirable that it should be determined by business men than by an officer of the court; so it is submitted for your consideration, with this explanation: that you are to consider whether the company acted reasonably and prudently in view of all the circumstances by which they were surrounded in the region through which the road was built, and bearing in mind that the company had the right to build its road there and to maintain a section-house somewhere there, notwithstanding the snow-slides which might occur, or rock-slides, or whatever dangers might be found in that country, and that using care and prudence in that regard, with a view to the dangers to which they were exposed, they cannot be charged with negligence only in the absence of such care and prudence as the circumstances made it necessary they should use."

11th. The circuit court erred in its charge to the jury considered and taken as a whole.

12th. The circuit court erred in charging the jury substantially to the effect that they must find for the defendant.

88 13th. The circuit court erred in overruling the motion of the plaintiff for a new trial.

And the said Marcella Doyle prays that the judgment aforesaid

may be reversed, annulled, and altogether held for naught, and that she may be restored to all things which she hath lost by occasion of the said judgment.

THOMAS M. PATTERSON,
CHARLES S. THOMAS,
Attorneys for Plaintiff in Error.

Endorsed on cover: Case No. 13,653. Colorado C. C. U. S. No. 100. Marcella Doyle, plaintiff in error, *vs.* The Union Pacific Railway Company. Filed September 25, 1889.